

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE)
WASTE ACTION PROJECT;)
WASHINGTON PUBLIC EMPLOYEES)
FOR ENVIRONMENTAL)
RESPONSIBILITY; RESOURCES FOR)
SUSTAINABLE COMMUNITIES; and)
CITIZENS FOR A HEALTHY BAY,)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent,)
And)
ASSOCIATION OF WASHINGTON)
BUSINESS and WASHINGTON STATE)
DEPARTMENT OF TRANSPORTATION,)
Intervenors.)

PCHB NO. 00-173
(Construction Storm Water Permit)

ORDER GRANTING
PARTIAL STAY

Appellants Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees for Environmental Responsibility, Resources for Sustainable Communities and Citizens for a Healthy Bay (hereafter referred to collectively as Puget Soundkeepers) have filed an appeal challenging the terms of a National Pollution Discharge Elimination System (NPDES) Baseline General Permit for Stormwater Discharge Associated with Construction Activities (Construction Stormwater Permit) issued by the Washington State Department of

Ecology (Ecology). The Association of Washington Business (AWB) and Washington State Department of Transportation have been granted intervenors status as respondents in the case.

Puget Soundkeepers have moved for a partial stay of the Construction Stormwater Permit and have also moved for summary judgment on the issues raised in their appeal. The summary judgment is being addressed in a separate Order of the Board. The stay came before the members of the Pollution Control Hearings Board, Robert V. Jensen, James A. Tupper, Jr. and Kaleen Cottingham. Administrative Appeals Judge, Phyllis K. Macleod is presiding for the Board on this case. The following documents were considered in deciding this motion for stay:

1. Appellants Motions for Stay and Summary Judgment.
2. Declaration of Richard Smith with Exhibits A-DD.¹
3. Ecology Response in Opposition to Appellants' Motions for Stay and Summary Judgment.
4. AWB's Memorandum in Opposition to Appellants Motion for Summary Judgment and Stay.
5. Declaration of Lori A. Terry with Exhibits A-D.
6. Declaration of Edward Molash with attachments.
7. Reply Supporting Appellants' Motions for Stay and Summary Judgment.
8. Notice of Appeal and documents of record in the case file.

¹ Respondents have moved to strike portions of the Richard Smith affidavit on the basis that it contains testimony of counsel. A modified affidavit has been submitted in response to the objections. The Board recognizes that attorney affidavits should simply provide copies of relevant information without highlighting or commentary. The modified affidavit, however, will not be stricken. It is not prejudicial and no weight will be given to any objectionable portions.

Based on the record and evidence before the Board on the Motion for Stay, the Board enters the following decision.

FACTS

In October 2000 Ecology issued the general stormwater permit for construction activities which is being challenged in this case. In establishing the terms of the general permit Ecology was engaged in implementing the Federal Clean Water Act (CWA), 33 U.S.C. §§1251-1376, and the Washington State Water Pollution Control Act, Chapter 90.48 RCW, and their accompanying regulations.

General permits are an alternative to individual NPDES discharge permits. General permits allow regulators to efficiently administer a permit process covering large numbers of similar activities. Companies engaged in activities regulated by the permit, indicate their desire to pursue discharge through a general permit by filing a Notice of Intent (NOI). Ecology has the right to deny coverage after receipt of the NOI, but in the absence of denial, coverage is extended based upon the NOI. WAC 173-226-200. Entities covered by the general permit are required to conduct their operations in compliance with the terms and conditions set forth in the permit.

The Construction Stormwater Permit requires permittees to prepare and implement a Stormwater Pollution Prevention Plan (SWPPP). The SWPPP is to identify best management practices (BMP's) to minimize erosion and sediment from rainfall runoff at construction sites and to identify, reduce, eliminate or prevent the pollution of stormwater. SWPPPs must be prepared before construction activities begin. They are not submitted to Ecology for approval

or review, but are required to be available on site. The public can obtain access to a SWPPP through request to Ecology. BMPs are to be selected from the Stormwater Management Manual for Puget Sound Basin for inclusion in the SWPPP. Inspections every week and within a day of a substantial rainfall are required to make sure the BMPs are properly maintained and functioning.

The Puget Soundkeepers are seeking a stay of coverage under the Construction Stormwater Permit for discharges to waters listed under §303(d) of the CWA. (33 U.S.C. §1313(d)) Each state is required by § 303(d) to identify waters that are failing to meet water quality standards:

Each state shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.

33 U.S.C. § 1313(d)(1)(A). The law further requires that each state establish the total maximum daily load (TMDL) necessary to implement the applicable water quality standards for such waters. 33 U.S.C. § 1313 (d)(1)(C). The State of Washington has listed water segments that are impaired for identified pollutants in its §303(d) list. A schedule for the development of TMDL's for listed waters is also in place.

Puget Soundkeepers argue that coverage should not be extended under the Construction Stormwater Permit to any discharge that will add an identified pollutant to a water quality limited water segment. The respondents contend that coverage under the general permit is

appropriate in the absence of a TMDL creating waste load allocations for the pollutant in question.

ANALYSIS

The appellants are seeking a partial stay of the effectiveness of the Construction Stormwater Permit pursuant to WAC 371-08-415. The Board's rules establish the following standards for granting a stay:

The requester makes a prima facie case for stay if the requester demonstrates either a likelihood of success on the merits of the appeal or irreparable harm. Upon such a showing, the board shall grant the stay unless the agency demonstrates either:

- (a) A substantial probability of success on the merits; or
- (b) Likelihood of success and an overriding public interest which justifies denial of the stay.

WAC 371-08-415(4).

The CWA prohibits permits for discharges that cause or contribute to an exceedence of water quality standards. 33 U.S.C. §1311(b)(1)(c); 40 C.F.R. 122.44(d); 40 C.F.R. 122.4; See also, RCW 90.48.520; WAC 173-226-070. No party has cited any authority indicating that a permit can be granted that causes an exceedence of water quality standards. One of the disputed issues in this case is whether the Construction Stormwater Permit will result in such exceedences.

The § 303(d) listing process, by definition, identifies bodies of water that currently fail to meet applicable water quality standards for specified pollutants. It follows that allowing new or additional discharges of an identified pollutant to an impaired water body would necessarily

cause or contribute to the existing violation of water quality standards. Such an action is contrary to state and federal law and would cause harm to the receiving water that is not easily repaired. Under such circumstances the stay standards for likelihood of success on the merits and irreparable harm are both met. Therefore, a stay precluding coverage under the general permit would be appropriate for new or additional discharges to §303(d) listed waters under the following limited terms and conditions:

1. New discharges to §303(d) listed waters will not be allowed coverage under the Construction Stormwater Permit if the anticipated discharge will include the pollutant for which the water body is listed unless it can be documented that no water quality violation will occur.
2. New discharges to a water body for which a TMDL has been developed will not be allowed coverage under the Construction Stormwater Permit unless the discharge would be in compliance with the TMDL.

These terms will protect specifically identified non-compliant water from discharges that would result in further violations of water quality standards while the litigation over this permit continues. The law is clear in prohibiting discharges that will cause a water quality violation and this partial stay will prevent new discharges under the Construction Stormwater Permit that would cause such a problem, while allowing coverage if a potential permittee can establish that a water quality violation would not occur. Based on the foregoing analysis the Board enters the following:

ORDER

1. New discharges to §303(d) listed waters will not be allowed coverage under the Construction Stormwater Permit if the anticipated discharge will include the pollutant for which the water body is listed unless it can be documented that no water quality violation will occur.
2. New discharges to a water body for which a TMDL has been developed will not be allowed coverage under the Construction Stormwater Permit unless the discharge would be in compliance with the TMDL.

Nothing in this stay of coverage for new discharges under the Construction Stormwater Permit precludes a facility from seeking an individual NPDES permit.

DONE this _____ day of _____ 2001.

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, CHAIR

JAMES A. TUPPER, JR.

KALEEN COTTINGHAM

Phyllis K. Macleod
Administrative Appeals Judge, Presiding